No. 46689-9

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Morpho Detection, Inc.

Respondent,

v.

State of Washington, Department of Revenue

Appellant.

Brief of Respondent

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I. Introduction

Finding as a matter of undisputed fact, that Respondent, Morpho Detection Inc., (hereinafter referred to as "MDI") performed no work "under, upon, or above real property of or for the United States," the Thurston County Superior Court, Judge Schaller presiding, concluded that MDI is not a "consumer" under RCW 82.04.190(6) which reads:

> (6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, ... including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes part of the realty by virtue of installation; ... . Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

Therefore, summary judgment in favor of MDI was entered. CP 646 (Order Granting Plaintiff's Motion for Summary Judgment); *See also*, RP 30-31.

On appeal, the Appellant, State of Washington, Department of Revenue, (hereinafter referred to as "the Department") principally argues that MDI could be a consumer under RCW 82.04.190(6) even though it did not work under, upon, or above real property of or for the United States. Br. of App. 1 – 36. The Department's Brief also contains a one

page argument, without citation to the Record, that as a matter of law the United States, through TSA, has a real property interest in the airport properties. *Id.* at 36 -37.

The plain, unambiguous language of RCW 82.04.190(6) demonstrates that the Superior Court, and not the Department, is correct as to the meaning of the term "consumer". The undisputed evidence in the Record establishes that TSA had no real property interest of any kind or nature in the real property on which the work allegedly occurred.

II. Counterstatement of Issues Pertaining to Assignments of Error

Must a person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures do such work under, upon, or above real property of or for the United States to be a consumer pursuant to RCW 82.04.190(6)?

III. Counterstatement of the Case

Statement of Facts

MDI is a leading manufacturer of explosive detection machines (EDMs). As a result of the terrorist attacks on September 11, 2001, the Transportation Security Administration ("TSA") contracted with MDI for the purchase of hundreds of EDMs which were to be deployed by TSA throughout the country. TSA is part of the United States Department of

Homeland Security, a Department of the United States federal government. CP 32 (Decl. of Piper).

The EDMs material to this litigation have all been deployed and operated at airports in Washington State. There are 46 such machines. 41 of the machines were deployed at SeaTac Airport and the remaining five machines were deployed at Spokane Airport. CP 32 – 33 (Decl. of Piper).

The Department alleges that MDI installed the machines at the airports and thereby improved the airport buildings.[1] *See e.g.*, Br. of App. at 11. The locations at which the 46 machines are deployed, the locations at which the Department alleges MDI performed the business of improving a building, is not real property of or for the United States. The real property on which the machines sit is under the exclusive control and belongs to the airports at which the machines are deployed. CP 28 - 31 (Declarations of Anderson and McDevitt). The United States has no lease or other real property right to or interest in such real property. *Id.*[2]

For the period January 1, 2002, through March 31, 2006, the Department assessed MDI sales and/or use tax plus interest and penalties measured by what it understood to be the value (with minor adjustments)

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[1] While MDI disputes that it performed such installation and/or that such installation improved any building, for purposes of its motion for summary judgment such allegations were assumed true.

[2] TSA does have a lease in other airport property.

of the 46 EDMs manufactured and sold by MDI to TSA that were subsequently deployed by TSA in Washington.[3] CP 33 (Decl. of Piper).

To satisfy the assessment, between July 18, 2012 and July 20, 2013, MDI paid DOR $5,413,642.38. *Id.* The DOR assessment contended that such tax was due on the theory that MDI is a consumer of the EDMs deployed by TSA in Washington under RCW 82.04.190(6). *Id.*

Statement of Proceedings

MDI paid the assessment and sought refund under RCW 82.32.180 which provides for a *de novo* proceeding before the Thurston County Superior Court. CP 10 -15 (Amended Complaint). The Department never filed an Answer to MDI's Amended Complaint.[4]

MDI brought a motion for summary judgment raising two issues:

1. Is MDI the type of person to which RCW 82.04.190(6) applies?
2. Does the statute apply when the work is not being performed under, upon, or above real property of or for the United States?

CP 19 (Mot. For Summary Judgment). The Department brought a cross motion on both issues, and both parties filed various declarations in

[3] The adjustment related to a deduction for the value of the assembly work performed on site in Washington.

[4] RCW 82.32.180 does not require an Answer to be filed and an examination of the Clerk Papers demonstrates that none was filed. The Amended Complaint raises additional grounds for granting MDI the relief it seeks that have not been ruled on by the Superior Court and are not ripe for review. MDI contends, *inter alia*, that it did not install the EDMs, did not improve any building, that the tax unconstitutionally discriminates against interstate commerce and that the tax violates the Supremacy Clause.

support of their motions. *See*, CP 60 (Dep't. Opp. to Morpho Motion for Summary Judgment). CP 28 – 35 (Declarations of Piper, McDevitt and Anderson); and CP 36 – 54 and 111 – 620 (Declarations of Huffman and Weissman).

As to the first issue, the Superior Court ruled that there was a genuine issue of material fact and denied the motion. RP 29. CP 646 (Order Granting Plaintiff's Motion for Summary Judgment).

As to the second issue, the Superior Court entered a finding that "no genuine issue of material fact exists" as to "whether any such work occurred 'under, upon, or above real property of or for the United States'" and concluded that MDI "is not a "consumer" under RCW 82.04.190(6) and RCW 82.12 in regards to the deployment of explosive detection machines at Washington airports during the tax period at issue in this matter." *Id.* The Court therefore entered summary judgment in favor of MDI. *Id.*

Prior to consideration of the motion for summary judgment, the Superior Court ruled on various motions regarding the declarations filed in support of the parties' motions. RP 8 and 10.

Recognizing the import of the fact that the real property was not of or for the United States, the Department moved to disqualify MDI's witnesses from stating such fact even though they have personal knowledge of the fact. CP 55 – 58 (Dep't. Motion to Strike).

The Superior Court granted the Department's motion and struck from the Declaration of Anderson and the Declaration of McDevitt the precise sentence in which both declarants testified that the real property at which the EDMs were and are deployed is not real property of or for the United States. RP 8.

The Court explained that "the facts that ... the court ultimately relies on as it relates to the real property status – who owns it, who doesn't own it, who has an interest, who doesn't have an interest – separate and apart from my interpretation of the meaning, are separately set out in both of the declarations by Mr. Anderson and Mr. McDevitt." RP 9. Those separately set out additional facts were not stricken from the Declarations[5] and are the only evidence in the Record regarding who has and does not have a real property interest in the property at which the EDMs are deployed. Those Declarations established as a matter of undisputed fact that the United States has no ownership interest, leasehold interest, or other real property right to or interest in the property at which the EDMs are deployed. *See*, RP 30 – 31.

The Court also granted MDI's motion to strike hearsay from the Declaration of Huffman. This motion was unopposed at the hearing. RP 10.

[5] We do not mean to imply that the Department even moved to strike those statements of fact. It did not.

At the hearing on the motions below, the Department did attempt to argue that MDI's witnesses were wrong because the TSA leases other real property at the airport. RP 19 - 20. In response, MDI argued that the declarants were specific. *See generally*, RP 24 and CP 19 (Mot. For Summary Judgment). Both declarants first declared they knew the location of the machines and then declared that the real property at which the EDMs were and are deployed by TSA "is real property owned (and exclusively controlled by others than the United States). The United States has no lease or other real property right to or interest in *such* real property." Declarations of Anderson and McDevitt. (Emphasis added). The witnesses did not declare that the federal government had no interest in *other* real property at the airport. Thus, the Department's evidence regarding other property did not create a dispute over the property at issue.

The Superior Court reviewed the references the Department contended gave the United States some real property interest in the locations at which the machines were deployed.[6] The Court did not find those references sufficient to create a genuine issue of material fact as to whether or not where the EDMs were installed was under, upon, or above real property of or for the United States.[7] RP 31. Therefore, the Court granted MDI's motion for summary judgment on the second issue.

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[6] The references were to an administrative office and/or a break room, not to the locations where the EDMs were deployed. RP 31.

[7] The Superior Court also expressly rejected "the defendant's argument that real property is for the United States just means for the benefit of the United States. It clearly relates back to real property; so if there is some sort of real property interest that the government

IV. Summary of Argument

RCW 82.04.190(6) provides:

> (6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, ... including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes part of the realty by virtue of installation; ... . Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

The plain, unambiguous language of the statute requires that the specified activity (the business of constructing, repairing, decorating, or improving new or existing buildings or other structures) must occur "under, upon, or above real property of or for the United States."

The undisputed facts are that the locations at the airports at which the EDMs are deployed are owned and exclusively controlled by the airports. the United States has no lease or other real property right to or

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has. which would be a lease. a license. an easement. or something of that issue. And the defendant has presented no evidence and has not created a genuine issue of material fact on that issue." RP 30 – 31.

Despite this express ruling. the Department's third assignment of error reads, "the Superior Court erred in ruling that the United States must have a beneficial interest in the real property where buildings are improved for the use tax to apply." Br. of App. at 2. This phrasing of the issue might make it appear that the Superior Court agreed with the Department's argument that real property is for the United States just means for the benefit of the United States. Later in its Brief. the Department recognizes that the Court ruled that RCW 82.04.190(6) "applies only when the federal government owns. or has some other property interest in the real property on which the work is performed." Br. of App. at 21.

interest in such real property and the EDMs are used at the airport for the benefit of the airport, the airlines and the flying public. Declarations of Goodwin and McDevitt. CP 28 - 31. Thus, the real property at which the EDMs are deployed is not of or for the United States, and MDI cannot be a "consumer" under RCW 82.04.190(6).

This conclusion is supported by the plain, unambiguous language of the statute, rules of statutory construction, and rules of English grammar.

Unable to refute the plain, unambiguous meaning of the statute, the Department spends many pages detailing the work MDI allegedly performed at the airports. Br. of App. at 4 - 9. To this, no response is necessary. The issue is not whether MDI performed the specified activity. The sole issue is whether the activity was performed "under, upon, or above real property of or for the United States." It was not.

Unable to refute the plain, unambiguous meaning of the statute, the Department also mischaracterizes prior litigation, offers an interpretation of the statute that requires additional words and/or makes portions of the statute superfluous, argues that the intent of the legislature was to pass a tax other than it did, creates a straw man argument and ends with an attempt to create an interest in Washington real property as a matter of law out of federal statutory language.

After quickly providing the plain meaning of RCW 82.04.190(6) by reference to its unambiguous language, we address the rules of

statutory construction and the rules of grammar which control the interpretation of the statute. We then identify and/or correct the Department's errors regarding its several separate arguments.

V. Argument

A. Standard of Review

The standard of review of a Superior Court's order granting summary judgment is *de novo*. *Clean v. City of Spokane*, 133 Wn.2d 455, 462, 947 P.2d 1169 (1997).

B. RCW 82.04.190(6) Only Applies if the Constructing, Repairing, Decorating, or Improving Is Under, Upon or Above Real Property of or for the United States.

1. The Unambiguous, Plain Language of the Statute Requires the Specified Activity to Occur Under, Upon or Above Real Property of or for the United States

RCW 82.04.190(6) provides:

> (6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, ... Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

The unambiguous language of the statute is that the specified activity -- the business of constructing, repairing, decorating, or improving

new or existing buildings or other structures --must occur "under, upon, or above real property of or for the United States."

The undisputed fact is that the real property on which the EDMs are located is not "real property of or for the United States." Declarations of Anderson and McDevitt.[8] Therefore, RCW 82.04.190(6) does not apply to MDI and the Superior Court's judgment should be affirmed.

2. *RCW 82.04.190(6)'s Plain Language Must Be Given Effect and Any Ambiguity Must Be Construed in Favor of the Taxpayer According to Rules of Statutory Construction.*

While the statutory interpretation issue raised by this case concerning RCW 82.04.190(6) has not been previously addressed by Washington Courts, the appellate courts of this state have repeatedly stated the rules courts should follow in interpreting tax statutes.

Absent ambiguity, courts rely on the plain language of the statute. *City of Spokane v. Dep't of Revenue*, 104 Wn. App. 253, 258, 17 P. 3d 1206 (2001). Courts should not and do not construe an unambiguous statute. *Vita Food Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978). If a tax statute is ambiguous, the statute must be construed most strongly

[8] In the Superior Court, the Department tried to claim that the witnesses were wrong because the TSA leases other real property at the airport. The witnesses were specific. Both witnesses first declared they knew the location of the machines and then declared that "[t]he real property at which the EDMs were and are deployed by TSA is real property owned (and exclusively controlled by others then the United States). The United States has no lease or other real property right to or interest in *such* real property." Declarations of Anderson and McDevitt (emphasis added). The witnesses did not declare that the federal government has no interest in *other* real property at the airport.

against the taxing authority.[9] *Group Health v. Department of Revenue*, 106 Wn.2d 391, 722 P.2d 787 (1986). That is, if there is doubt as to the meaning of a taxing statute, it is to be construed in favor of the taxpayer and against the taxing body. *Vita Food Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978).[10]

For example, in *Vita Foods*, our Supreme Court was interpreting a tax statute that levied a privilege tax upon the "original receiver" of fish. "Original receiver" was statutorily defined as the person first receiving, handling, dealing in or dealing with the fish within the State of Washington. *Id.*

The Department argued that the statute was intended to apply to the first person receiving the fish which is subject to the taxing jurisdiction of the State. Therefore, when an Indian Tribe was the first person physically receiving and dealing with the fish within the State but the Tribe was not taxable because while within the State it was still beyond the taxing jurisdiction of the State, the Department argued that Vita Foods, the second person dealing with the fish, was taxable.

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[9] As RCW 82.04.190(6) is unambiguous, the Department's arguments concerning statutory intent and legislative history should not be considered. Moreover, if the statute was ambiguous, then the statute must be construed most strongly against the Department. *See*, authorities cited and discussed in text.

[10] If doubt or ambiguity exists in regards to a tax exemption or deduction, rather than a statute defining who is taxable such as RCW 82.04.190(6), the statute would be construed strictly, though fairly, and in keeping with the ordinary meaning of the statute's language against the taxpayer. *Group Health v. Department of Revenue*, 106 Wn.2d 391, 727 P.2d 787 (1986).

The Court rejected the Department's argument because the statute was clear on its face. The original receiver was defined as the first person actually, physically receiving the fish. The Department's argument would have the Court add words to the statute to fit what it claimed was the legislative intent (that the legislature meant the first receiving person to mean the first person over whom taxing authority may be asserted). Even if the Court believed the legislature intended something other than what it expressed, the Court lacked the power to add words to the statute. The Court buttressed its conclusion by reasoning that if there is doubt as to the meaning of a taxing statute, it is to be construed in favor of the taxpayer and against the taxing body. *Id.*

Below, the Thurston County Superior Court held that the statute was unambiguous and applied the plain meaning of the statute. Finding no genuine issue of material fact concerning whether or not the EDMs were installed under, upon, or above real property of or for the United States, the Superior Court concluded MDI is not a consumer. RP 31.

3. Rules of Grammar and Rules of Construction Require the Specified Activity to Occur Under, Upon or Above Real Property of or for the United States.

The Department claims that it is not a requirement that the real property be of or for the United States. It claims it is enough if the specified activity is done for the United States. Br. of App. at 15, 20 – 21. The specified activity is constructing, repairing, decorating, or improving

new or existing buildings or other structures. The Department fails to understand that the specified activity has to occur under, upon, or above real property of or for the United States.

The Department's construction would have the specified activity be constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property. Thus, it claims it is sufficient if the real property is of the United States or if the specified activity is for the United States. *Id.*

Such a construction is incorrect because:

(a) The Department's construction violates normal grammar rules;

(i) There is no comma or other punctuation after real property, and there would be if the Department's construction were correct;

(ii) The antecedents for the words "of or for" need to be identical. The Department's construction changes antecedents from real property for the word "of" to the specified activity for the word "for". Such a construction does violence to the English language.

(b) The Department's construction violates the rules of construction;

(i) "[A]ll the language used (in a statute) is given effect with no portion rendered meaningless or superfluous." *New West*

Fisheries, Inc. v. Department of Revenue, 106 Wn. App. 370, 376, 22 P. 3d 1274 (2001).[11]

The Department's construction makes the words "under, upon, or above real property" superfluous. Everything is under, upon, or above real property. To have meaning, those words need to be tied to the phrase "of or for the United States."

The Department's construction also apparently makes the word "of" in the phrase "real property of or for" superfluous. The Department expressly argues that:

> the constitutional problem of taxing the federal government has nothing to do with who owns the land. Washington could constitutionally impose retail sales tax on a private buyer of construction services on federal land. (Citation omitted) There would be no constitutional reason to shift the incidence of tax in these situations to the contractor. (footnote omitted) Rather, the purpose of the use tax on federal contractors is to address the constitutional prohibition on taxing work for the United States.

Br. of App at 28 – 29.[12]

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[11] The *New West Fisheries, Inc. v Department of Revenue* case involved the enhanced food fish tax. The tax was subject to a credit for any tax previously paid on the same fish. New West contended that the language "any tax" permitted it a credit for an unemployment insurance tax and a worker's compensation tax. The Department countered that the tax had to be on the same fish. The Court ruled in favor of the Department because focusing on the word "any" made the language "on the same fish" superfluous. *See also, United Parcel Service, Inc. v. Department of Revenue*, 102 Wn. 2d 355, 687 P.2d 186 (1984) (Statutory deduction for vehicles used for transporting therein persons or property for hire across the boundaries of the state held to require the vehicles to cross the state boundaries and not just the persons or property because if just the persons or property had to cross state lines the language regarding vehicles would be superfluous.)

[12] The Department's omitted footnote argues that the "Legislature may have included the phrase "real property of" into the use tax scheme because of some older cases suggesting that states could not tax work on federal property." Br. of App. at 29 n. 9. The

But, the statute has the words "real property of or for". A construction that makes the word "of" superfluous must be rejected.

(ii) Even if a Court believes the Legislature intended something other than what it expressed, the Courts lack the power to add words to the statute. *See, Vita Foods*, discussed at 11 – 12, *supra*.

The Department's construction requires an additional word to be added to the statute. Rather, than reading "real property of or for the United States," the Department has the statute reading "real property of the United States or *work* for the United States." (Emphasized word "work" is added by Department construction while the word "of" and the phrase "under, upon or above real property" become superfluous). Therefore, the Department's construction must be rejected.

The Superior Court's reading that the real property must be of or for the United States is the only reading that gives meaning to each word of the statute. "Real property is of" the United States if the United States owns the real property. "Real property is for" the United States if the United States has an easement, lease, right to possess or other such interest

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Department then tells this Court that it need not determine the meaning of improving buildings under, upon or above real property "of" the United States that do not involve payment from the federal government. The Department gives that instruction apparently because its construction leads to "of" being superfluous.

in the real property. Thus, if the federal government leased the land, it would be real property for the United States.[13]

Persuasively, the Superior Court's reading of the phrase "of or for" is also consistent with what the Department described on page 11 and again on page 22 of the Department's Opposition to Morpho's Motion for Summary Judgment. CP 69 and 80. On those pages, the Department twice inadvertently demonstrated by reference to RCW 82.04.050(2)(b)[14] and RCW 82.04.190(4)[15] that "real property for" means, real property of a lessee, easement holder, or holder of a right of possession. There is no reason to think "real property for" means anything different in RCW 82.04.190(6).[16]

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[13] The paragraph in text is a complete response to the Department's argument that the Superior Court's reading "reads the words 'or for' out of RCW 82.04.190(6)'s consumer definition" and the Department's argument that neither "the trial court nor Morpho has ever offered a plausible meaning for the words 'or for' that could support the result the court reached." *See*, Br. of App. at 25. This paragraph is also a complete response to the straw man argument that "or" does not mean "and". See. Br. of App. at 29 - 32. The Department made the same argument below even though MDI has never argued that "or" meant "and". *Cf.* Brief of Appellant at 29 – 32 with Department's Opposition to Morpho's Motion for Summary Judgment at 18 – 20. CP 76 – 78. The Superior Court's reading gives every word of RCW 82.04.190(6) meaning without changing any words. The Department's construction based on its overstated understanding of statutory intent does not.

[14] According to the Department, "real property of or for" means in the context of RCW 82.04.050(2)(b) owning, leasing having the right to possess or having an easement. *See*, CP 69 (Department's Opposition to Morpho's Motion for Summary Judgment at 11). The Superior Court adopted that meaning of the terms.

[15] According to the Department, citing RCW 82.04.190(4), "real property of or for" refers to owning, leasing or having the right of possession to or an easement in real property. *See*. CP 80 (Department's Opposition to Morpho's Motion for Summary Judgment at 22). Again, the Superior Court adopted that meaning of the terms.

[16] Tellingly, the Brief of Appellant makes no reference to RCW 82.04.050(2)(b) and RCW 82.04.190(4) and instead argues that RCW 82.04.050(2)(c) shows how the Legislature would write a statute if it intended "for" to mean some lesser property right interest. Br. of App. at 26 n. 8. The Department is wrong on multiple counts. First, the statutes referred to in text show – as the Department argued below – what "real property

As whatever work MDI performed in regards to the EDMs did not occur on real property of the United States or on real property for the United States, MDI is entitled to summary judgment.

4. Prior Litigation Does Not Support The Department.

The Department discusses MDI's administrative appeal, even though the Superior Court's proceeding is *de novo* because it wants to create the illusion that prior tribunals agree with the Department. Not only is MDI's administrative appeal irrelevant to the Superior Court's proceeding, all such a proceeding results in is a Determination by the Department. Obviously, the Department's Determination agrees with the Department. That is always the case. It is a tautology.

The Department also discusses the federal administrative appeal MDI brought in its unsuccessful attempt to recover the amounts assessed as an after imposed tax. Not only is the "ODRA" decision described by the Department nothing more than a recommendation to the TSA Administrator that it reject MDI's claim that Washington's use tax is an after-imposed tax, but the TSA Administrator's decision was appealed. *See, Morpho Detection, Inc. v. Transportation Sec. Admin.*, 717 F.3d 975 (D.C. Cir. 2013).

On appeal, the issue before this Court was expressly not decided.

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for" means. Second, RCW 82.04.050(2)(c)'s language "any real property owned by an owner who conveys the property by title, possession, or any other means" does not show what "real property for" means. The quoted language shows how someone could convey title, that is, ownership. "Real property for" is something less then "real property of". The latter refers to ownership, the former refers to a lesser real property right or interest.

The Federal Court of Appeals wrote:

> Whether the Revenue Department's statutory construction is correct as a matter of public policy or legislative intent is a question left to the Washington state courts where Morpho is currently challenging the tax assessment. 'on a variety of state-law grounds.' (Citation omitted). We conclude only that it is a permissible interpretation of the ambiguous language.

Morpho Detection, Inc. v. Transportation Sec. Admin., 717 F.3d 975 at n. 10 (D.C. Cir. 2013).[17]

5. The Department's Arguments Based On Statutory Intent Are Incorrect.

The Department argues at length and repeatedly that the statute's intent is to tax persons selling to the federal government because the state cannot impose its sales or use taxes directly on the federal government. *See. e.g.*, Br. of App. at 22 – 24, 27.[18]

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[17] The Department ultimately attempts to take comfort from the Court of Appeals statement that its interpretation was "permissible." The Department argues that its interpretation should be afforded considerable deference. Br. of App. at 36. While deference to an agency interpretation of an ambiguous statute within its area of special expertise might ordinarily be appropriate, here the statute is plain and unambiguous. "If a statute's meaning or a rule's meaning is plain and unambiguous on its face, then we give effect to that plain meaning. ... Only ambiguous statutes require judicial construction; statutes are not ambiguous simply because different interpretations are conceivable." *Department of Revenue, v. Bi-Mor, Inc.*, 171 Wn. App. 197, 286 P.3d 417 (2012). Moreover, this statute is a taxing statute. Any ambiguity in such a statute is construed in favor of the taxpayer, not the Department. *See.* discussion of relevant cases at pgs. 10 -12 *supra.*

[18] *See also.* Br. of App. at 1 and 16 (the Department states that the State taxes contractors working for the federal government without limiting it to contractors working on real property of or for the United States).

The problem with the Department's argument is it only focuses on a portion of the legislative intent.[19] Clearly, the Legislature could have easily drafted a statute that defined persons selling tangible personal property to the federal government as consumers. That would have accomplished the legislative goal the Department repeatedly claims exists. But, the Legislature passed a statute that did something different.

The Legislative intent can best be understood by reference to the statutory language. The Legislature limited the definition of consumer to persons attaching tangible personal property to buildings or other structures under, upon, or above real property of or for the United States. Not only does the statute's first sentence require the work to be under, upon or above real property of or for the United States, but the statute's final sentence is: "Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other

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[19] The Department's legislative intent argument, like its other arguments concerning federal case law and statutory construction are also inappropriate because the statute is not ambiguous. "If a statute's meaning or a rule's meaning is plain and unambiguous on its face, then we give effect to that plain meaning. .... Only ambiguous statutes require judicial construction: statutes are not ambiguous simply because different interpretations are conceivable." *Department of Revenue, v. Bi-Mor, Inc.*, 171 Wn. App. 197, 286 P.3d 417 (2012). Moreover, this statute is a taxing statute. Any ambiguity in such a statute is construed in favor of the taxpayer, not the Department. *See*, discussion of relevant cases at pgs. 10 -12 *supra*. Thus, none of these separate Department arguments need be considered

structure by such person;" Such building or structure must be "under, upon, or above real property of or for the United States."

The intent is not to tax all persons selling tangible property to the United States. By including the language regarding real property of or for the United States and the language regarding the person attaching, installing or otherwise incorporating the property to such building or other structure, the Legislature made clear that its intent was to tax a much smaller class of persons, only those attaching, installing or otherwise incorporating tangible personal property to a building or other structure under, upon, or above real property of or for the United States. That class of persons is much smaller than the Department argues were intended to be taxed. But, the Legislature specifically did not tax those persons only selling tangible personal property, those persons only working on real property but not attaching, installing or otherwise incorporating tangible personal property to a building or other structure, or those persons working on buildings or other structures that are not on real property of or for the United States.[20]

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[20] The Department claims the Superior Court's reading of the statute is "strained" or "absurd" because by excluding MDI from the definition of consumer, it results in the United States being a consumer and sales and use taxes cannot be imposed on the United States because of the Supremacy Clause of the U. S Constitution. *See*, Br. of App. at 27 – 28. The Department is wrong because (i) RCW 82.08.0254 and RCW 82.12.0255 specifically exclude from the sales and use tax sales and uses which the State is prohibited from taxing under the U S. Constitution and (ii) the United States is clearly a consumer whenever it buys tangible personal property that is not installed, attached or

6. No Genuine Issue of Material Fact Exists As To Whether Any MDI Work Occurred Under, Upon, or Above Real Property of or for the United States.

Unable to create a genuine issue of material fact, the Department falsely claims that the Superior Court *assumed* that the real property on which the EDMs are located is not real property of or for the United States. Br. of App. at 24.

The Department is simply wrong. Declarants with personal knowledge declared that the real property at which EDMs are and were deployed is real property owned by the airports. They further declared that the United States has no lease or other real property right to or interest in such real property. Finally, both Declarants testified that the EDMs were used at the airport for "the benefit of the airport, the airlines and the flying public." Declarations of Anderson and McDevitt. After reviewing the evidence, the Superior Court found as a matter of fact that where the EDMs were installed is not real property of or for the United States. On that basis, summary judgment was granted to MDI. RP 31.

Unable to create a genuine issue of material fact, the Department also boldly proclaims, without any evidence to substantiate its claim, that as a matter of law, TSA possessed a license to the airport properties. Br.

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otherwise incorporated into real property. Thus, the "problem" the State feared was anticipated and specifically addressed by the Legislature. The Department is just wrong.

of App. at 36. Rather then rely on evidence, the Department attempts to create a TSA real property interest by arguing that the federal government has a statutory duty to maintain security at the airports.

Again, the Department is simply wrong. Its bald claim must fail in the face of the direct testimony by witnesses with personal knowledge. Moreover, TSA's statutory authority to maintain security does not require it to have any real property interest in any real property on which the EDMs are located. The witnesses declared such interest does not exist, no evidence exists to the contrary, and the TSA can maintain security through other locations at the airports (checkpoints), electronic means (viewing images from the EDMs and/or other devices from a remote location) and random patrols or inspections. Nothing mandates that the TSA must have a real property interest to perform its function.

VI. Conclusion

For the reasons stated above, the Superior Court's Order Granting Plaintiff's Motion for Summary Judgment is correct and should be affirmed.

Respectfully submitted, this 20th day of February, 2015

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Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 20 day of February, 2015 I served a copy of this Brief of Respondent via email, pursuant to an electronic service agreement, on the following:

Joshua Weissman (JoshuaW@ATG.WA.GOV)
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Franklin G. Dinces